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No. 163

In the Matter of Schenectady
County Society for the Prevention
of Cruelty to Animals, Inc.,
Respondent,

v.

Richard P. Mills, as Commissioner
of Education of the State of New
York,
Appellant.

Frank K. Walsh, for appellant.
Mathew B. Tully, for respondent.

SMITH, J.:

We hold that an agency responding to a demand under the
Freedom of Information Law (FOIL) may not withhold a record
solely because some of the information in that record may be
exempt from disclosure. Where it can do so without unreasonable

difficulty, the agency must redact the record to take out the exempt information.

Petitioner sent an e-mail to the Education Department, asking for the names and addresses of veterinarians licensed by the Department in Schenectady County. The Department replied that it would provide a list of names, and the city and state portions of the addresses, but would not provide street addresses because "[i]t is not public information for us to provide home addresses for a licensed professional and that's [sic] what we have on file." Petitioner responded: "What about business address?", and the Department replied: "No[t] everyone has provided us with a business address."

Petitioner then formally requested the list of names and addresses under FOIL. The Department again offered to provide names and cities, but repeated its refusal to provide street addresses, explaining: "As our computerized files are currently configured, we are unable to distinguish a licensee's business address from a residential address." After an unsuccessful administrative appeal, petitioner began this proceeding to require that the list be produced. Petitioner specifically sought only "a photocopy of the requested list with names of licensed professionals and their business addresses."

Supreme Court dismissed the petition. The Appellate Division reversed, with two Justices dissenting, and granted the petition (Matter of Schenectady County Socy. for the Prevention

of Cruelty to Animals, Inc. v Mills, 74 AD3d 1417 [3d Dept 2010]). The Department appeals as of right, pursuant to CPLR 5601 (a), and we affirm.

The Department argues that disclosure of licensees' home addresses "would constitute an unwarranted invasion of personal privacy" and so is not required by FOIL (Public Officers Law § 87 [2] [b], 89 [2-a]). But we do not need to address this claim, because petitioner is not seeking home addresses, only business addresses, and the Department makes no claim that the business addresses are private.

It seems obvious to us that, if the Department does not want to supply home addresses, it should simply delete them from the list. It says that its computer database does not distinguish between home and business addresses, but it does not claim that it would be hard to find out, by communicating with the licensees, which addresses are homes and which are businesses. This should not be a burdensome task, because the number of licensed veterinarians in Schenectady County is unlikely to be very large; it was represented at oral argument that the number is 72.

It is true that FOIL generally does not require an agency to create a new record (Public Officers Law § 89 [3] [a]: "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity" with specified exceptions). But there is a difference between

creating a new record and redacting an existing one. Courts deciding FOIL issues often order redaction when a record contains both exempt and non-exempt information (e.g., Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 464 [2007] [noting that "even when a document subject to FOIL contains . . . private, protected information, agencies may be required to prepare a redacted version with the exempt material removed" (citing Public Officers Law § 89 [2] [c] [i])]; Matter of New York Times Co. v City of N.Y. Fire Dept., 4 NY3d 477, 482-483 [2005]; Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse, 65 NY2d 294 [1985]). In responding to petitioner's FOIL request, the Department had the choice of producing the existing record in full or removing the information that it did not want to produce and that petitioner did not demand. It cannot refuse to produce the whole record simply because some of it may be exempt from disclosure.

We are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours effort, and at negligible cost. Instead, lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years. It is our hope that the Department, and other agencies of government, will generally comply with their FOIL

obligations in a more efficient way.

Accordingly, the order of the Appellate Division should be affirmed with costs.

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Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided October 25, 2011